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2006 NOV 16 P 3:44

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In the Matter of the Application of Picacho  
Water Company for an Extension of its  
Certificate of Convenience and Necessity  
in the City of Eloy in Pinal County

DOCKET NO. W-03528A-06-0313

In the Matter of the Application of Picacho  
Sewer Company for a Approval to Extend  
its Sewer Certificate of Convenience and  
Necessity to Additional Portions of Robson  
Ranch and EJR Ranch in Pinal County

DOCKET No. SW-03709A-06-0314

**EXCEPTIONS OF  
PICACHO WATER COMPANY  
AND  
PICACHO SEWER COMPANY**

Picacho Water Company and Picacho Sewer Company (collectively referred to  
herein as "Picacho" or the "Company"), through counsel undersigned,<sup>1</sup> hereby submit  
their exceptions to the Recommended Opinion and Order ("ROO") dated November 7,  
2006, in the above-captioned matters.

Picacho's exceptions to the ROO relate to the inclusion of Finding of Fact No. 32  
at page 7 and the corresponding seventh Ordering paragraph which appears on page 9,  
beginning on line 26. The seventh Ordering paragraph provides as follows:

IT IS FURTHER ORDERED that in light of the on-going drought  
conditions in central Arizona and the need to conserve groundwater,  
Picacho Water Company [and] Picacho Sewer Company are prohibited  
from selling groundwater for the purpose of irrigating any future golf  
courses within the certificated expansion areas or any ornamental lakes or  
water features located in the common areas of the proposed new  
developments within the certificated expansion areas.

<sup>1</sup> Contemporaneous with the filing of these Exceptions, counsel has filed a Notice of Appearance on  
behalf of Picacho Water Company and Picacho Sewer Company.

Picacho opposes the inclusion of the seventh Ordering paragraph (and related provisions) in the ROO for several reasons, as set forth below.

1. The proposed seventh Ordering paragraph is unnecessary.

Picacho's requested CC&N extension area in this case is only 160 acres out of the 3,000-acre master planned Robson Ranch that is being developed by Robson Communities. The requested CC&N extension area does not include a golf course (or any portion thereof), ornamental lakes or water features in any common areas. These facts were noted on page 3 of the Staff Report dated September 1, 2006, in this docket which states:

According to PSC's July 14, 2006 response to Staff's insufficiency letter, "there are no artificial lakes, golf courses, ornamental structures or other aesthetic water features planned for the extension areas. Open spaces in the proposed extension area will be watered with groundwater in accordance with state law.

At the hearing, no evidence was presented to suggest that groundwater would be used within the requested CC&N extension area to fill any artificial lakes, ornamental structures or aesthetic water features, or to water a golf course. Staff made no recommendation in its Staff Report regarding any prohibition on the use of groundwater as proposed in the seventh Ordering paragraph, nor was there any discussion of such a prohibition at the hearing. Based upon the evidence presented at the hearing, the administrative law judge appropriately included Finding of Fact No. 31 on page 7 of the ROO, which states:

According to Staff's Report, Picacho Sewer has stated there are no artificial lakes, golf courses, ornamental structures or other aesthetic water features planned for the extension area and that open spaces will be watered with groundwater in accordance with state law. Staff further stated that Picacho Sewer plans to use effluent to water the golf course in the existing CC&N area, beginning in the Fall 2006, when it is expected that development will reach 100 homes. Additionally, the pipes for the effluent are already in place and any excess effluent will be sent to recharge basins and recharge wells.

1 In light of this finding of fact and the evidence presented in this case, Picacho was  
2 surprised to see the inclusion of the seventh Ordering paragraph because it is neither  
3 relevant nor necessary based upon the facts and circumstances of this case.

4 2. The seventh Ordering paragraph is a condition which is outside the proper  
5 analysis of a requested CC&N extension.

6 There are two questions the Commission must answer in the affirmative before  
7 granting a new CC&N or extending an existing CC&N. First, is there a demonstrated  
8 "need and necessity" for the proposed utility service. Second, is the applicant "fit and  
9 proper" to hold a CC&N. Conclusion of Law No. 4 on page 8 of the ROO answers the  
10 first question in the affirmative: "[t]here is a need and necessity for water and  
11 wastewater service in the proposed service territory as set forth in Exhibit A... ." Then,  
12 Conclusion of Law No. 5 on page 8 of the ROO answers the second question in the  
13 affirmative, stating "[s]ubject to compliance with the above-stated conditions, Picacho  
14 Water and Picacho Sewer are *fit and proper entities* to receive extensions of their water  
15 and wastewater Certificates, for the proposed extension area in Pinal County, as set forth  
16 in Exhibit A." (Emphasis added.)

17 The Commission often attaches conditions to its findings that there is a need and  
18 necessity for service and that the applicant is fit and proper. In the ROO in this case, for  
19 example, the Commission attaches conditions that Picacho (i) charge its customers the  
20 Commission authorized rates and charges, (ii) file its ADEQ approval to construct,  
21 (iii) file a copy of the developer's Certificate of Assured Water Supply, (iv) file a copy  
22 of the Pinal County franchise agreement, and (v) file an affidavit with its annual report  
23 attesting that Picacho is current on paying its Arizona property taxes. So long as Picacho  
24 complies with these conditions as set forth in an adopted final decision, there is a need  
25 and necessity for service and Picacho is fit and proper to provide that service. Failure to  
26 comply with the conditions of a final decision could subject Picacho to actions by the  
27 Commission including sanctions or even the loss of its CC&N. All of these conditions  
28 support the public interest, and the Commission is constitutionally and statutorily

empowered to ensure as much.

However, the ROO imposes an additional condition which is outside the scope of either of the two relevant findings. This is the prohibition against the sale of groundwater for golf courses, ornamental lakes and water features. Finding of Fact No. 32 specifically states that the reason for this additional condition is:

In recent months, the Commission has become increasingly concerned about the prolonged drought in Central Arizona. Therefore, we believe Picacho Water and Picacho Sewer should be required to conserve groundwater and that Picacho Water should be prohibited from selling groundwater for the purposes of irrigating any future golf courses within the certificated expansion areas or any ornamental lakes or water features located in the common area of the proposed new developments within the certificated expansion areas.

Although Picacho can appreciate a concern about the effect of a drought on water supplies, the Company respectfully submits that this is a public policy determination which does not relate to whether the applicant for a CC&N has demonstrated a need and necessity for the requested utility service or that the applicant is a "fit and proper" entity to be granted the CC&N extension. Hypothetically, if Picacho failed to charge the Commission approved rates and charges or failed to obtain its ADEQ Approval to Construct or its Certificate of Assured Water Supply, an argument could be made that the Company is not "fit and proper" to continue to hold the CC&N. However, if the Company supplies water as required pursuant to its CC&N to a future customer (such as a business or homeowners association) who uses the water for a water feature, then pursuant to the ROO as drafted, the Company is potentially subject to a finding that it is no longer "fit and proper" and the Company's CC&N would be subject to revocation. This is not an unrealistic scenario and demonstrates a possible result of this condition.

An analogous issue arose in Docket No. SW-0345A-00-1043, a case involving the former Citizens Water Services Company (now Arizona-American Water Company) for an extension of its CC&N to serve the Verrado master planned community west of Phoenix. In that case, the parties were asked to brief whether the Commission may consider the issue of "urban sprawl" when evaluating the appropriateness of a request for

1 extension of a CC&N. In its brief,<sup>2</sup> the Commission Staff provide its analysis of the  
2 question "How should the Commission consider the issue of 'urban sprawl' when  
3 evaluating the appropriateness of a request for extension of a CC&N?" The following is  
4 an excerpt of Staff's analysis:

5 In general, when the Commission evaluates an application for a CC&N, it  
6 should focus its analysis upon the public service corporation, not upon the  
7 developer. Some parties may argue that an issue such as "urban sprawl" is  
8 entirely outside the Commission's jurisdiction, because it relates to the  
9 nature of the development, not to the nature of utility service. By contrast  
10 Staff believes that the relevance of any particular issue, including "urban  
11 sprawl," will depend on the facts of the case.

12 For example, if the Commission's consideration of "urban sprawl" focuses  
13 solely upon the merits of "urban sprawl" in and of itself, i.e., whether we  
14 want our cities to be compact rather than sprawling, then the Commission  
15 may be overstepping its authority. But if the evidence presented to the  
16 Commission demonstrates that the characteristics of "urban sprawl" are  
17 potentially detrimental to the utility, either financially or operationally, or  
18 to its ratepayers, then the Commission has the authority to craft an  
19 appropriate remedy.

20 Certainly, there are instances in which the Commission may assert a kind  
21 of ancillary jurisdiction over entities that are not public service  
22 corporations. *See, Arizona Corp. Comm'n v. State ex rel Woods*, 171 Ariz.  
23 286, 297 P.2d 807, 818 (1992) (holding that the Commission may regulate  
24 the formation of utility affiliates); A.A.C. R142-206.C (requiring  
25 customers to grant easements to utilities to ensure proper service  
26 connections).<sup>3</sup> These examples illustrate that the Commission's authority  
27 is necessarily quite broad, at times extending even to entities that are not  
28 public service corporations. Nonetheless, these examples also illustrate  
that this sort of extended jurisdiction is most sustainable when it is directly  
related to the goals and policies of utility regulation.

In summary, the degree to which the Commission may consider "urban  
sprawl" is case-specific. In instances where the issue is related to the  
utility's operations or finances, the Commission may fashion appropriate  
conditions and/or orders to address it. If, by contrast, the Commission  
were to debate the merits of "urban sprawl" in an isolated way, separate  
and apart from its effects upon the utility or its service, the resulting order  
may be vulnerable on appeal.

Similarly, Picacho submits that the proposed seventh Ordering paragraph has  
been proposed "in an isolated way, separate and apart from its effects upon the utility or  
its service." The stated basis for the condition is that "the Commission has become

<sup>2</sup> Commission Staff's Supplemental Brief dated October 19, 2001 at page 3 (Docket No. SW-0345A-00-1043).

<sup>3</sup> Footnote omitted.

1 increasingly concerned about the prolonged drought in Central Arizona.” However,  
2 there is no evidence in the record addressing this concern, and the issue was not raised  
3 by Staff or discussed at the hearing. Nor has there been any evidence or discussion  
4 regarding the financial or operational effect that this proposed condition would have on  
5 Picacho, its water service, or its customers. Adopting such a condition without any  
6 evidentiary support or a showing of relevance may result in unintended consequences, as  
7 discussed herein.

8 Finally, as suggested by Staff in its analysis of the "urban sprawl" issue raised in  
9 the Citizens case, Picacho believes that rather than setting precedent by imposing such a  
10 permanent condition on CC&N requests in Central Arizona, the Commission should  
11 evaluate each utility on a “case specific basis” to determine whether the condition is  
12 necessary and appropriate under the totality of circumstances. Given the nominal  
13 acreage in the requested CC&N extension are (160 acres), and the fact that there will not  
14 be a golf course, ornamental lakes or water features in the extension area, the condition  
15 is unnecessary in this case.

16 3. The issue of the use of groundwater in Pinal County has already been  
17 addressed by Arizona Department of Water Resources.

18 The Arizona Department of Water Resources (“ADWR”), though its Third  
19 Management Plan, has already promulgated as state law requires, a comprehensive  
20 conservation program for the Pinal Active Management Area, in which the CC&N  
21 expansion area is located. The Arizona Groundwater Code (“Groundwater Code”),  
22 A.R.S. § 45-401, et seq., was enacted by the Legislature to protect the state’s economy  
23 and welfare, and to “provide a framework for the comprehensive management and  
24 regulation of the withdrawal, transportation, use, conservation and conveyance of rights  
25 to use the groundwater in this state.” A.R.S. § 45-401(B). Responsibility for these  
26 critical matters was placed in the hands of the ADWR (A.R.S. § 45-102(A)), headed by a  
27 director (A.R.S. § 45-102(B)), with sweeping “general control and supervision” of  
28 groundwater (A.R.S. § 45-103(B)).

1 The Director has carried out this responsibility for groundwater conservation by  
2 enacting a series of management plans (five are required by the Groundwater Code for  
3 each Active Management Area ("AMA"), one for each decade beginning in 1980  
4 (A.R.S. § 45-563)). The Director most recently adopted the Third Management Plan  
5 ("TMP"), which, by law, had to require for municipal providers<sup>4</sup> "additional reasonable  
6 reductions in per capita use to those required in the second management period and use  
7 of such other conservation measures as may be appropriate for individual users." A.R.S.  
8 § 45-566(2). The TMP allows landowners and residents to use groundwater delivered to  
9 them, "subject to ... (c)onservation requirements developed by the director pursuant to  
10 article 9 of this chapter." A.R.S. §§ 45-492, 45-561 – 568.

11 Under the TMP, certain end users, including turf related facilities (parks, golf  
12 courses, and common areas of housing developments) are subject to direct regulation by  
13 the Director. Chapter 6 of the TMP, the Industrial Conservation Program, provides for  
14 an annual water allotment for turf-related facilities such as golf courses. A municipal  
15 provider, which would include Picacho under A.R.S. § 45-561(10), is not prohibited  
16 from selling groundwater to the facility, provided, however, that the facility must  
17 comply with the relevant conservation requirements. This being the case, the proposed  
18 seventh Ordering paragraph results in conflicting regulation. For example, every golf  
19 course within an AMA has a water allotment under the Management Plan. If the  
20 Company is barred from selling groundwater to the golf course, and the golf course has a  
21 legal right to purchase and use groundwater, then the golf course could bring a legal  
22 action against Picacho, the Commission, or both, to prevent the interference with the  
23 delivery of water under its established TMP allotment. Without separate pumping  
24 authorities of their own, developers justifiably rely on municipal providers, like the  
25 Company, to deliver water to meet their water needs, and the seventh Ordering  
26 paragraph would prohibit the Company from meeting those needs, leaving developers

27  
28 <sup>4</sup> Under A.R.S. § 45-561(10), a "municipal provider" means "a city, town, private water company or  
irrigation district that supplies water for non-irrigation use."

1 with no supplies of water to serve legitimate water uses already authorized by ADWR  
2 under Arizona law. The Commission should make sure that its orders are in harmony  
3 with the TMP and the water management goals ADWR established for the Pinal AMA.  
4 This is especially important within the Pinal AMA, where reliance on groundwater to  
5 serve new uses is expressly provided by statute.

6 Under Arizona law, ADWR is charged with the establishment and enforcement of  
7 groundwater management and conservation programs for municipal providers including  
8 the Company. In light of this fact, and the potential inconsistencies that would result  
9 from the proposed seventh Ordering paragraph, the condition should not be adopted. If,  
10 however, the Commission does not delete Finding of Fact No. 32 and the seventh  
11 Ordering paragraph, the Company believes that the following language should be added  
12 to the end of each: "except where such sales are made in accordance with the  
13 groundwater management goals and management plans established by the Arizona  
14 Department of Water Resources."<sup>5</sup>

- 15 4. The short-term use of groundwater in the initial irrigation of a golf course  
16 bridges the gap in time from the first home sales in a community until  
sufficient homes are sold to generate an effluent supply for the golf course.

17 The Company believes that it would be helpful to the Commission to briefly  
18 outline why such a blanket prohibition as applied to a golf course would run contrary to  
19 the public policy purpose the Commission is attempting to achieve, as well as the  
20 business reality of selling homes in this environment.

21 In the instant situation, Robson Communities is developing the age-restricted  
22 Robson Ranch community. A significant number of the homes sold in this community

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23 <sup>5</sup> It should be noted that in Commission Decision No. 64307, which is the Decision in the Citizens case  
24 discussed above, in ordering that renewable water supplies shall be the primary source of water for the  
25 golf course and other turf facilities (which will also be the case for the Company's existing CC&N area),  
26 the Decision goes on to state that "except that groundwater may only be used consistent with State Law  
27 which requires a replenishment of mined groundwater." Therefore, the Commission has allowed the use  
28 of groundwater for such purposes consistent with State Law. Additionally, the Decision states that "if  
groundwater is used for such purposes, Citizens shall notify the Commission within two business days,  
and show good cause why the use of groundwater is necessary. Unlike the condition set forth in the  
ROO which is an absolute prohibition, the Commission had previously provided flexibility for the use of  
groundwater if good cause could be shown.



1 will be to people specifically interested in a golf amenity, and the health and recreational  
2 benefits of such an amenity. It has been Robson's experience that before a homebuyer  
3 will purchase a home in such a community, the golf course needs to be completed so the  
4 homebuyer can make a determination to buy into that community. Completion of the  
5 golf course fuels future sales of homes in the community. Although the golf course will  
6 be watered with effluent, in the very beginning the golf course will necessarily be  
7 watered with groundwater, which is the only available source of water for the golf  
8 course. This gives some time for additional homes to be built and sold to generate  
9 enough effluent for the golf course to be watered with effluent.<sup>6</sup> The use of groundwater  
10 has positive benefits in that it provides the means for which the golf course can be  
11 maintained in the early stages of development to allow homes to be sold which in turn  
12 produces effluent which ultimately provides the irrigation source for the golf course.

13 What we have here is a classic "chicken and egg" scenario. Without the use of  
14 groundwater to construct and maintain the golf course—which is the very amenity which  
15 attracts the age-restricted homebuyer—homes will not be sold and effluent will not be  
16 produced to water the golf course. A blanket prohibition on the use of groundwater as  
17 proposed in the seventh Ordering paragraph does not take into consideration this reality  
18 which allows the use of effluent to come to fruition. Moreover, such a condition should  
19 only be imposed after a case-by-case analysis, and not as a boilerplate condition.

- 20 5. The Robson model is to maximize the efficient use of effluent in Robson  
21 communities and minimize the impact of development on groundwater  
22 supplies.

23 The golf courses constructed by Robson in its age-restricted communities satisfy  
24 the open space requirements of the local zoning ordinances. Thus, the golf courses do  
25 not create any superfluous water demands in the community. Further, Robson always  
26 enrolls its lands as "member lands" in the Central Arizona Groundwater Replenishment

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27 <sup>6</sup> This is consistent with the statements made in the Staff Report and Finding of Fact No. 31 where it  
28 states that after 100 homes are built in the existing CC&N area, the existing golf course will be able to  
use effluent.

1 District ("CAGRDR"). This ensures that every drop of groundwater withdrawn by  
2 Picacho is replenished by the CAGRDR with a renewable supply in the same AMA where  
3 the water was withdrawn. Therefore, there is no mining of groundwater within the  
4 Robson communities.

5 Further, because Picacho is an integrated water and wastewater utility, up to 70%  
6 of the water that will be supplied to residential and commercial customers will be  
7 collected through the sewer system and treated, thereby producing effluent that will be  
8 used for golf course irrigation. This integrated model for providing water and sewer  
9 service further reduces the demand placed on the aquifer by the community. To the  
10 extent that there is any excess effluent after delivery for golf course irrigation, Picacho  
11 will recharge such effluent through its permitted recharge facility.

12 6. The Company is legally required to supply water to its customers.

13 Picacho has an obligation to supply water to its customers pursuant to A.R.S.  
14 Title 40, its CC&N and its Commission-approved tariffs. Moreover, once the water  
15 passes through a customer's meter, the Company cannot legally control what that  
16 customer does with the water. The proposed seventh Ordering paragraph would put  
17 Picacho at risk of a complaint or other legal action by a customer who has been denied  
18 water which was requested for a lawful use. The Company should not be put in such a  
19 position by the Commission.

20 Conclusion

21 For the reasons set forth above, Picacho requests that the Commission delete  
22 Finding of Fact No. 32 at page 7 and the seventh Ordering paragraph on page 9 of the  
23 ROO. However, if the Commission decides not to delete Finding of Fact No. 32 and the  
24 seventh Ordering paragraph, then Picacho requests that the following language be added  
25 to the end of Finding of Fact No. 32 and the seventh Ordering paragraph: "except where  
26 such sales are made in accordance with the groundwater management goals and  
27 management plans established by the Arizona Department of Water Resources." In  
28 addition, if the Commission does not delete Finding of Fact No. 32 and the seventh

1 Ordering paragraph, the reference to "Picacho Sewer Company" in Finding of Fact No.  
2 32 and the seventh Ordering paragraph should be deleted and Finding of Fact No. 32  
3 should be relocated to the "Water System" section of the ROO that begins on page 4.

4 RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of November, 2006.

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11 Original and 13 copies filed November 16,  
12 2006, with Docket Control.

13 Copy hand-delivered November 16, 2006, to:

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